U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 15Nov2002

CASE NUMBER: 2002-LHC-915

OWCP NO.: 08-113546

IN THE MATTER OF

BILLY R. BILBRO,
Claimant

v.

UNIVERSAL MARITIME SERVICE CO.
c/o ABERCROMBIE-SIMMONS-GILLETTE,
Employer

SIGNAL MUTUAL INDEMNITY ASSN., LTD.,
c/o ABERCROMBIE-SIMMONS-GILLETTE,
Carrier

APPEARANCES:

Ed Barton, Esq.,
Quentin Price, Esq.,
John D. McElroy, Esq.,
On behalf of Claimant

Steve Roberts, Esq,
Rick L. Rambo, Esq,
On behalf of Employer/Carrier

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Worker's Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by Billy R. Bilbro (Claimant) against Universal Maritime Service Co. (Employer) and Signal Mutual Indemnity Assn., LTD, (Carrier). The issues raised by the parties could
not be resolved administratively, and the matter was referred to the Office of Administrative Law

Judges for a formal hearing. The hearing began on July 24, 2002, in Beaumont, Texas and concluded on August 29, 2002 in Houston, Texas. The parties were vigorously and well represented by counsel.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs in support of their respective positions. Claimant testified and called the following witnesses: George Helm (retired general manager for Employer), Tom Abercrombie (adjuster for Carrier, Abercrombie, Simmons and Gillette), John Randolph (longshoreman), Jerry Kelly (longshoreman), Thomas Isbell (longshoreman and business agent for ILA Local 24), and William Kramberg (vocational expert). Claimant introduced 28 exhibits which were admitted including various LS-18s and other DOL forms, Claimant's tax returns for 1996 through 2000; deposition of Dr. Martin Grabois; medical records from Drs. Grabois, Michael Heggeness, Bruce Weiner, Dallal Abdelsayed and Rivers Oaks Imaging and Diagnostic; vocational rehabilitation records of Eva M. Haier; vocational report of Kramberg; statement of Claimant taken on September 2, 1997; Claimant's written interrogatories and request for production to Employer and Employer supplemental answers to Claimant's interrogatories; photographs of trucks; edited video of dock operations and Claimant's payroll records from West Gulf Maritime Association from December 27, 1996 through December 19, 1997. [1]

Employer called Randy Stiefel (manager of marine operations for Employer) and Nancy Favoloro (vocational expert), and introduced 59 exhibits including: Claimant's answer to interrogatories; functional capacity evaluation by Baytown Physical Therapy & Back to Work Center; various DOL documents including an OWCP-5 by Dr. Grabois dated September 15, 2000, and LS-18, 202, 203, 206, 207,208; Claimant's application for ILA pension benefits; correspondence between ILA and Claimant concerning retirement benefits; letter to Claimant from Social Security Administration; recorded statement of Claimant taken by Paul Haney dated September 2, 1997; Employer's application for Section 8 (f) relief; Claimant's West Gulf Maritime Association (WGMA) earnings records from July 7, 1996 through May 23, 2002 with operational and job codes; records from Claimant's business; depositions of Claimant and Dr. Jack Pennington; medical records from Drs. Grabois, Abdelsayed, Heggeness, Weiner, Michael Kaldis, James Muntz, John Randolph, James Strangmeier and Baytown Physical Therapy & Back to Work Center; surveillance CDs dated February 1,3, 1999; March 31 and April 9, 26, 2001; January 15, 21, April 25, May 24, June 11, 2002, and various documents from WGMA; Local 24 seniority roster; report of Kramberg and interview of Claimant; deposition of John Thomas Randolph (retired clerk and checker and member of ILA local 1351; various income statements from Claimant business, Out of Sight, Inc., for 1996, 1997, 1998, 1999, 2000 and 2001; worker's compensation history filled out by Claimant; collective bargaining agreement entitled Deep Sea and Coastwise Longshore and Cotton Agreement between West Gulf Maritime Association (various owners, operators and stevedores operating at Texas ports excluding Brownsville but including Port of Lake Charles, Louisiana) and South Atlantic and Gulf

[1] References to the transcript and exhibits are as follows: Trial Transcript- Tr.___; Claimant's exhibits-CX-__, p.__ ; Employer exhibits-EX-__, p.__; Administrative Law Judge exhibits- ALJX-__; p.___.

Coast District, International Longshoremen's Association and its affiliated locals including Locals Nos. 20, 21, 22, 23, 24 of Houston, 25, 26,30, 31 and 2047;[2] ILA Local 24 work sheets for Employer for July 12, 13,14, 15,16,17,2002; Decision and Order in the Matter of *Clinton Sneed (Claimant) against James J. Flanagan Stevedores, Inc. (Employer) and Signal Mutual Indemnity Assoc. Ltd. (Carrier)* Case No. 97-LHC-2026.

Post-hearing briefs were file by the parties. [3] Based upon the stipulation by the parties, the evidenced introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Employer filed Notices of Controversion on October 1, 2001, December 21, 2001, and January 24, 2002.

2. An informal conference was held on November 5, 2001.

3. Claimant's average weekly wage was $1,551.19.

4. Employer paid Claimant temporary total disability benefits from August 20, 1997 through September 16, 2001 for a total of 212.71 weeks at $801.06 per week for a total of $170,296.91.

5. Employer paid medical benefits in the amount of $36,674.23.

II. ISSUES

The parties submitted the following unresolved issues:

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[2] This collective bargaining agreement is referred to as the Deep Sea Agreement.

[3] Claimant's brief was 59 pages in length and single spaced with the first 36 pages devoted to a detailed recitation of testimony followed sections on general considerations, fact of injury, nature and extent of disability, medical, section 8(f), interest and attorney fees and conclusion. Employer's brief was 29 pages and double spaced and divided in sections detailed as preface, summary, facts, argument, and conclusion.

1. Whether Claimant was injured during the course and scope of his employment with Employer.

2. Whether there existed an Employer/Employee relationship at the time of the alleged injury.

3. The nature and extent of injury (date of maximum medical improvement; post-injury wage earning capacity).

4. Whether Claimant is entitled to additional medical benefits, penalties, interest, attorney fees and expenses.

5. Whether Employer is entitled to Section 8 (f) relief.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant is a 56 year old male born on August 15, 1946. He has an 8th grade education and no vocational training. Prior to his employment as a longshoreman, Claimant worked as a groundsman or caretaker, construction worker and heavy equipment operator. From August 1974 to 1980 Claimant did longshore work for Texas Transport and Terminal Co. followed by additional longshore work for other companies including Employer where he worked from1983 to the date of his alleged injury (July 7, 1997), at Barbours Cut, Port of Houston. Claimant has been a member of ILA Local 24 since 1975. (EX-1, p 4; EX-2, p.15; Tr. 45-47, 85-87).

Although Claimant has performed a variety of longshore work including sack throwing and cargo most of his dock work has been limited to gear man duties. As a gear man Claimant was responsible for furnishing heavy equipment such as spreader bars, wires, chains, shackles, hooks, fork lifts, ladders, sledge hammers, chain saws to load and unload containers from ships. Claimant placed this equipment on pallets and then transported it by fork lift to ships where it was used by other longshoremen in the loading or unloading process. On occasion, Claimant was responsible for taking acetylene torches and gauges onto ships to repair damaged lids and had to lift objects by hand weighing between 150 to 200 pounds, i.e., 3 inch wire cable measuring 30 feet in length. (Tr. 48 -63; CX-26). During his 14 year employment with Employer, Claimant performed only gear man duties under the supervision of general manager, George Helm, with whom he developed a close personal friendship. (Tr. 72-74).

In addition to gearman duties, Claimant also worked as a driver at the docks and possessed a CDL class A license. Claimant apparently qualified to be a driver in May, 1997, after passing a

physical and being placed on a "drivers board" from which he obtained job referrals. [4] As a driver he was responsible for transporting containers from ships to nearby yards driving no more than 25 mph. (Tr. 90, 91, 155-159).

WGMA payroll records show Claimant working as a gearman (job 161) for Employer (company 92) up through June 19, 1997 when Employer ceased stevedoring operations at Barbours Cut. (CX-29; EX-23). Thereafter, WGMA payrolls show Claimant working as a driver in June, July, and August, 1997, these employers: June 24 (Strachan Shipping Co. -5 hours); June 27 (Shippers Stevedoring Co.-6 hours); June 28 (Sea-Land Services Inc.-7.75 hours); July 8(Sea-land Services Inc.-10 hours); July 31(SSA Gulf Terminals, Inc.- 4 hours); Aug. 9(Sea-Land Services Inc-11 hours); Aug.12(James J. Flanagan-10 hours); Aug.13(Shippers Stevedoring Co.-13 hours). Like other longshoremen, Claimant received all his payroll checks from WGMA.[5] (Tr. 235-237).

Employer's last weekly payroll prior to cessation of operations on June 19, 1997 (CX-29), show Claimant being paid $6,298.00 for 232 hours of work representing 58 hours of work from June 13-19, 1997 plus two weeks of severance pay (87 hours), plus an additional 87 hours for clean up work . (Tr. 85-89, 395). It was on the last day of the clean up period, July 7, 1997, during which Claimant gathered Employer equipment for sale that Claimant asserted he hurt his back. Claimant verbally reported the injury to Helm, who was out of town attending a trustee meeting of WGMA's pension, health and welfare fund but declined to file a written report claiming injury and compensation until August 20, 1997, at which point back pain had progressed to the point where Claimant could no longer work. (Tr. 92-95; 326-337).

On August 7, 1997 Claimant sought medical treatment from family physician, Dr.Abelsayed. (Tr. 95-99). Employer then referred Claimant to orthopedist Drs.Weiner and Heggenes who diagnosed severe back pathology and recommended surgery. (CX-11, Tr.100-105). Claimant underwent two back surgeries in October, 1997, and August, 1999 (laminectomies), which were only partially successful in relieving pain.. (Tr. 107). Thereafter, Dr. Heggenes referred Claimant for pain management to Dr. Grabois who has been Claimant's treating physician since February 14, 2000. (CX-8 and 10). Currently Claimant takes Darvocet, Soma and Celebrex, stretches, uses a hot tub and whirlpool and lays down to relieve pain. (Tr.113-117).

As of the hearing date Claimant had resumed container operations at Barbours Cut under Randy Stiefel, manager of marine operations. Employer currently performs 50% of the container work at Barbours Cut using 6 berths or docks each about 1000 feet long while loading or unloading between 10 to 11 vessels per week (Tr. 515, 538).

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[4] Claimant is listed as number 25 on the rotational driver's board. (Tr. 155).

[5] WGMA payroll records indicate longshoreman, dates and place of service, type and hours of work performed and employing company. Payroll periods run from Friday at 12.01 a.m. to Thursday, midnight. (Tr. 385-394).

B. Claimant's Testimony and Medical Records

Claimant testified at length about his health prior to and subsequent to a July 7, 1997 injury, and his incapacity to work following the injury. Prior to the July 7, 1997 injury, Claimant testified that he experienced minor job injuries consisting of cut fingers for which he did not seek compensation or request a "ticket" for medical care. (Tr. 63, 64). In 1976, while working for Texas Transport, Claimant strained his back in the process of lifting a spreader bar, got a "ticket" authorizing medical care and missed 3 weeks of work but filed no compensation claim receiving instead his normal pay. (Tr. 65,66). In 1983, while working for Employer, then known as Maersk Container Service Company, Claimant got a piece of metal in his eye, got a "ticket" but filed no compensation claim. (Tr. 67, 68). On December 3, 1990, Claimant sustained a torn right medial meniscus when he pinched his leg between two vehicle bumpers, got a "ticket" and appropriate medical care, but sought no compensation. (EX-35, pp. 1-7 Tr. 69, 70).

In March, 1993, Claimant strained his back again while lifting a truck cab. Claimant apparently got a "ticket" and subsequently underwent physical therapy, took pain medication and missed several days of work, but filed no compensation claim. (Tr. 71). Therapy commenced on March 19, 1993, and continued through April 6, 1993, after which he was diagnosed with lumbosacral strain. (EX-35, pp. 14-[6]17). In March, 1995, family practice physician,. Dr. Abdelsayed, treated Claimant conservatively for low back pain on two occasions. (EX-35, pp.18-20). In September, 1996, Dr. Abdelsayed treated Claimant conservatively on four occasions for right shoulder pain receiving physical therapy, ultra sound and nerve stimulation. (EX-35, pp. 23-26). On February 19, 1997, Dr. Abdelsayed again treated Claimant for lower back pain that Claimant had been experiencing for a two week period. The pain was on the right side but did not radiate. Muscle spasm and stiffness in the thighs was noticeable for which Dr. Abdelsayed prescribed Soma and Daypro. (EX-35, p. 28).[7]

Claimant worked without interruption until June 19, 1997 when Employer ceased operations at Barbours Cut. Thereafter, Claimant worked an additional period of approximately two weeks until July 7, 1997 during which time Claimant collected and sold remaining gear and equipment. On July 7, 1997 while coiling up 30 feet of 1½ inch cable and placing it on a pallet, Claimant experienced severe pain as
he was pulling on the cable. (Tr. 80-91, 189). Claimant told a fellow longshoreman and friend, Jerry Kelly, about the injury later that day but did not immediately report it to General Manager, George Helm who was out of town attending a trustee meeting of WGMA.

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[7] Claimant introduced Dr. Abdelsayed's medical records as CX-18.

Claimant testified that he reported the incident to Helm, but could not remember the date when he told Helm, except to say it was within one to two weeks after the injury. [8] Claimant did not initially request a "ticket" but when the pain failed to subside and instead got worse, Claimant on August 20, 1997, requested and received a "ticket" after talking with Helm and adjuster, John Gillette. (Tr. 92-96). As noted previously, Claimant worked as a dock driver for other stevedoring companies on June 24, 27, July 8, 31, August 9, 12, and 13, 1997. (Tr. 235-236). Other than in his own business enterprises which existed prior to the July 7, 1997 injury, Claimant neither performed nor sought other work. (Tr. 209). Rather, he applied for ILA Pension Benefits in July, 1999, and August, 2001, and was approved for them in September, 2001. (EX 5 through 10, 49). Claimant also applied for ILA disability benefits in June, 1999, but was denied as was his subsequent Social Security disability benefits application of February, 2002. (EX-11).

Prior to securing a "ticket" on August 20,1997, Claimant on August 5, 1997, sought treatment for back pain from Dr. Abdelsayed. Notes from that visit show Claimant complaining about continuous back pain. Claimant had lost weight, did not remember how he had hurt his back and reported severe low back right side pain for which Dr. Abdelsayed prescribed Daypro and Soma while recommending an MRI and nerve conduction study. (EX-35, p. 29). On September 16, 1997, Claimant underwent an MRI which showed a large central/right lateral disc herniation at L4-5 significantly compressing the thecal sac and right L5 nerve. (EX-35, p. 45). A note from Dr. Abdelsayed dated September 2, 1997 indicated that she had treated Claimant for back pain for several years, but the pain in recent months had been more severe. (EX-35-36).

Employer referred Claimant to orthopedist, Dr Weiner, on September 9, 1997. Claimant attributed the pain to the July 7, 1997 cable pulling incident. Claimant demonstrated moderate spasm, positive straight leg raising and evidence of sciatica. (EX-35, p.41). Dr. Weiner ordered an MRI which was performed on September 17, 1997, and showed a "huge" herniation on the right at L4-5 requiring surgery. (CX-16, p. 8). Claimant then sought out Dr. Heggeness who examined him on September 30, 1997, assessed central lumbar stenosis and large disc herniation at L4-5, and recommended surgery which he performed on October 20, 1997. (EX-35, pp.50-59). When Claimant's condition failed to improve and showed evidence of re-herniation, Claimant underwent a second laminectomy on August 16, 1999. (EX-35, pp.136-137, Tr. 101-106). [9]

Claimant testified about continued pain problems following the second surgery whereupon

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[8] Claimant gave a different date of August 20, 1997 as his initial report of injury to Helm when he saw Dr. Randolph on January 23, 1998. Claimant explained that he gave that date only to represent the date he requested a "ticket" for medical treatment. (EX-53; Tr. 225-229). Claimant told investigator, Haney, on September 2, 1997, that he reported the injury to Helm several weeks prior to his conversation with Haney. (EX-12, p.11).

[9] Claimant introduced Dr. Heggeness medical records as CX-11. CX-12 were the records of Dr. James Muntz showing Claimant physically able to undergo the second back surgery.

Dr. Heggeness referred Claimant to Dr. Grabois for pain management. Since February 14, 2000, Dr. Grabois has treated Claimant conservatively prescribing a combination of Darvocet, Soma and Celebrex.[10] In addition, Claimant has relieved back pain by stretching and strengthening exercises, use of a hot tub, whirl pool, and reclining either in bed or a recliner 5 out of 7 days, 3 to 4 hours a day. (Tr.113-117, 144).

Medical records from Dr. Grabois show Claimant's initial evaluation on February 14, 2000, whereupon he was diagnosed with chronic pain syndrome status post-laminectomy. Claimant had follow up visits on March 16, 23, May 8, August 11, October 9, 2000; Feb 12 and August 23,2001, and June 10, 2002 with use of medications and home exercises for pain relief. During the treatment process, Dr. Grabois completed a work restriction evaluation, (OWCP 5)(CX-10, p., 8, EX 3,4),on September 15, 2000, following a functional capacity evaluation on August 24, 2000. The FCE (CX-13, pp. 2, 3) classified Claimant's functional capacity in the light to medium physical demand levels with occasional lifting of 20-50 pounds, frequent lifting of 10-20 pounds, and constant lifting of no more than 10 pounds, but noted that Claimant had to sit down frequently during testing and favored his right leg with limiting factors of back and leg pain.

On the OWCP 5 Dr. Grabois set forth the following restrictions: sitting-1 hour (intermittent), walking-1 hour (intermittent), standing-1 hour (intermittent); 0 to 1 hours lifting, bending, squatting, climbing, kneeling, twisting; lifting 0-10 pounds; unable to work 8 hours a day; retraining is necessary for light work; vocational rehabilitation services are necessary if Claimant intends to return to work. (CX-10, p.8). Subsequently, Dr. Grabois ordered another MRI which done on May 16, 2002 and showed the following:

1. Degenerative disc disease, post-operative changes, annular disc bulge and dorsal disc protrusion centrally and on the right at L4-5 without significant stenosis.

2. Minimal degenerative change in he disc, minimal disc bulge and dorsal annular tear without stenosis L5-S1.

3. Minimal degenerative change in the disc, minimal disc bulge and minal dorsal annular tear L3-4 without stenosis.

Concerning his ability to work, Claimant testified that he cannot do gear man duties because it involves too much bending, twisting, stooping, climbing, heavy lifting, and long hours. (Tr. 57). Further, he is unable to handle the chains or lanyards that a gear man must use. Regarding other jobs Claimant testified he is not able to drive a truck all day long because of the twisting, bending and stooping involved together with the lack of suspension and inherent vibration. He cannot work on a ship apparently doing rigging or lashing working because of his inability to climb the distances

[10] Claimant takes only minimal pain medication (one Darvocet) every other day, plus 3 to 4 Soma as a muscle relaxant. (Tr. 148-150).

required. (Tr. 128-132, 238-240, 245-249). Further, even if he could do some dock work for one day, he would not be able to work the next 3 or 4 days. However, he can bend on occasion. (Tr. 268).

On cross, Claimant denied having a back that was easily injured prior to July 7, 1997, but did refer to himself as having a "bad old back." (Tr. 178). Claimant admittedly engaged in the following activities since July 7, 1997: operation of a container business, purchase, sale and transport of heavy equipment; vacations involving hunting, fishing, and skiing. Regarding the container business, the record shows and Claimant admits, engaging in the purchase and sale of containers from the early 1980's to the present selling as many as 24 to 50 containers in 2000 and 2001 through a corporation known as "Out of Sight." (Tr. 134-135, 208). Out of this number Claimant estimated that he hauled between 25 to 40 containers utilizing a dragline to load and unload them. (Tr. 273, 282-286). An example of these business activities can be seen in Claimant's purchase of two forty foot containers from Sealand on July 7,1997 despite the presence of severe back pain. (Tr. 189-193).

Additionally, Claimant has admittedly on occasion hauled and operated heavy equipment (front end loader, backhoe, dragline, various trailers, a bull dozer and windmill). (Tr. 240, 256-260, 273-281). However, Claimant asserts and the record shows that as a driver he would be required to haul far more containers in a short period of time (5 per hour) at a much more active pace that he does in his own business. (Tr. 121-122, 524). In March and June,1998, Claimant recertified as a dock driver but has never attempt such work since August 20, 1997, claiming that a dock driver has to do repetitive bending, twisting, and climbing when exiting a truck to hook and unhook air hoses to chassis, an activity he cannot do. Admittedly, Claimant can do some of these activities on an occasional but not frequent basis as shown on various surveillance videos taken by Employer. (EX-36-44; Tr. 241, 245-260; 268, 282). However, Claimant never told Dr. Gravois or the vocational experts in this case about these activities. (Tr. 162,163, 290, 291, 294, 295, 301).

Claimant also admitted on occasion bending, pushing , and lifting while hauling a windmill, moving mattresses from an apartment to his home in Crosby, Texas, transporting a tractor tire, hooking up chains and picking up ramps to a goose neck trailer. (Tr. 262, 264, 265, 269).

Regarding the purchase and sale of heavy equipment, Claimant admitted buying and selling equipment such box blades, finish mower, tiller, seed spreader, mowers, grader scoop, yard truck, air compressor and flat racks and on occasion hauling some of this merchandise. (Tr. 288, 289). As far as recreational interest, Claimant admitted fishing from a boat 10 to 12 times a year; vacationing in Winter Park, Colorado in 2001 and 2002, where he unsuccessfully attempted to ski and engage in tubing but stopped because of the pain; trout fishing for 4 days in Port Aranzas; quail hunting from a truck; dove hunting in Winnie and Brady in 2001, and dear hunting in Sonora in 2000. (Tr. 210-217). However, none of his post-injury activities approached the demands of dock work. Indeed, according to Claimant it is hard to compare the jarring caused by container operations, especially when a crane accidentally picks up and drops a truck, to the ride in either Claimant's truck or bus.

(Tr. 310, 311). [11]

Claimant's income tax records for 1996 through 2000 (CX-3 through 6, EX-51), show the following losses from personal businesses: 1996- $18,902; 1997- $9,495; 1998- $9,476; 1999- $16,628; 2000-$12,714; and 1996-$18,902.

C. Testimony of George Helm, Jerry Kelly and Tom Abercrombie

George Helm, who worked for Employer from 1975 to 1999, testified that he worked for Employer as general manager of Employer's Houston operations during Claimant's employment at Barbour's Cut. Helm apparently hired Claimant as Employer's first longshoreman (gear man) in 1983 and employed additional longshoremen as part of a regular crew without the necessity of obtaining referrals from the ILA Local 24's hiring hall. (Tr. 314-318).

Helm developed a personal friendship with Claimant and kept him on the payroll after the June 19, 1997, shut down for about two weeks to gather together and sell remaining gear and machinery to other stevedores. Subsequent to that clean up process Helm, who out of state at a WGMA trustee meeting, learned from Claimant that he had hurt his back but initially did not want a "ticket." After returning to the jobsite, Helm could see that Claimant's injury was affecting his gait. Claimant eventually approached Helm and told him that his back problem was not improving at which point Claimant requested and Helm approved a "ticket." (Tr. 326-334).

Helm had no reason to question Claimant's assertion that he had in fact been injured on July 7, 1997 or Claimant's willingness to work. Accordingly, Helm filed out a report of injury, LS-202, indicating July 7, 1997 as the date of injury, thereby, giving Claimant the necessary "ticket"approving medical treatment. Helm knew of Claimant's past injuries and was aware of Claimant's practice of not requesting a "ticket." (Tr. 335-339). Helm testified that there was no light duty on the docks and that the work had to be done when presented after which breaks could be taken. Employees were required to work Monday through Friday, 8 hours a day with occasional night and weekend work. Further, the driver job was physically demanding. (Tr, 342-343).

On cross, Helm reaffirmed his belief in Claimant's honesty and their friendship. Helm admitted that Claimant had a bad back for years prior to the injury, confirmed Claimant's operation of heavy equipment on his ranch following the injury, and stated that the date of injury could have been a week earlier but he, Helm, had no reason to doubt either the date of injury, July 7, 1997, or the fact that Claimant reinjured his back while working for Employer. (Tr. 345-372).

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[11] Retired clerk and checker, John Thomas Randolph, confirmed Claimant's container business, Claimant's vacation in Winter Park and hunting excursions. (EX-50).

Jerry Kelly, who has worked for 40 years as a longshoreman and has been a long time friend of Claimant, testified that he was not working on July 7, 1997, but rather on that day, had gone down to the docks to talk to Allen Rob of Shippers Stevedoring about getting scrap pipe used in containers to build fence posts. Kelly was not able to find Rob and thereafter, went to see Claimant who was in the process of coiling up wire or cable on a pallet. Claimant told Kelly he was going to the office to cool off whereupon Kelly left and went to a nearby auto parts store. From there he telephoned Claimant asking if he wanted to go to lunch. Claimant declined stating that he had hurt his back and did not feel like eating (EX-54; Tr. 418-425).

On cross, Kelly admitted his friendship with Claimant and was unable to tell where he had worked on either July 6 or 8, 1997. Kelly admitted that Claimant had given him the date of July 7, 1997 as the date of his injury but that he was sure it was the same day he had gone to see Rob about the fence post. Kelly further stated that Claimant would not and did not know if he had been working that day since Claimant did not use the hiring hall to secure work. (Tr. 426-442).

Tom Abercrombie, adjuster for Abercrombie, Simmons & Gillette testified that Helm told him that Claimant continued to work past June 19 with Claimant probably working up through the end of June 1997. Abercrombie admitted that Claimant worked on June 27 and 28 and July 8, 1997 for other stevedore. Abercrombie contradicted Helm stating that Helm first learned of Claimant's injury on August 20, 1997, the same day Employer faxed the LS-18 or first report of injury. Further, Helm never suggested that Claimant worked during July, 1997. (Tr. 397-411).

D. Testimony of Tommy Isbell

ILA Local 24 Business Agent, Tommy Isbell, who has worked out of the Local's hiring hall for the past 25 years and performed all dockside jobs including driver, testified about employment practices and job requirements at Barbours Cut which are governed by the Deep Sea Collective Bargaining Agreement between various ILA locals, including Local 24 and stevedores at west Gulf ports including Barbour's cut. (EX-53).

Drivers are referred from a driving board. In order to get on that board longshoremen had to have the requisite seniority, possess a CDL license and pass a DOT physical. Use of prescription drugs is permitted only if they do not appear impair a drivers ability to work. Once a longshoreman gets on the driving board, he is then referred out on a rotational basis. There are currently 140 drivers on the board, but the Local would make room for Claimant in the event he was re-certified. Drivers have a 4 hour minimum guarantee if called to work. Some jobs last 12 hours. Drivers can leave early only if a replacement can be found. (Tr. 454-461).

Drivers operate trucks with a 5th wheel jack and latch that automatically lashes the truck to the trailer when the driver backs the truck under the trailer. Trucks are rough riding requiring the driver to do frequent bending to connect and disconnecting ground lines. On occasion, drivers are

required to assist dock workers moving devices such as wires, shackles or cables for heavy lifts. All jobs including that of driver are fast paced (5 containers per hour) not allowing breaks of 15 to 60 minutes. (Tr. 462-467, 505). While some longshore jobs may be described as lighter work, none of these jobs are available on a consistent basis. (Tr. 491).

Drivers follow directions from checkers on where to go (slip and pad location) and deposit chassis which are removed by either straddle crane or overhead forklift. (Tr. 483-487). Drivers are expected to assist other workers when connecting and disconnect container lines. (Tr. 504). On occasion drivers drive cargo on or off the boat. This work is regarded as hazardous because of steep inclines and lack or maneuverability. (Tr. 506). When receiving a container from ships, drivers are required to work under a crane or whip which requires twisting and looking around for fast truck spotting. (Tr. 507, 508). Drivers can and do decline work with impunity. (Tr. 479).

E. Testimony of Randy Stiefel

Manager of Marine Operations, Randy Stiefel testified about Employer's corporate structure as well as job classifications and assignments and loading and unloading operations at Barbour's Cut. Stiefel testified that Employer is owned by Maersk which in turne is owned by A. P. Moelhr, a Danish company. In 1997, Employer discontinued operations at Barbour's cut, reorganized and later restarted operations as a separate entity using newer and better equipment. (Tr. 546-549). Currently, Employer performs 50% of the container work at Barbours Cut employing drivers, riggers, pin knockers, and gang foreman on referral from Local 24's hiring hall. (Tr. 536).

Employer utilizes 8 drivers per gang who are responsible for making 5 trips or loads per hour working between 4 to 12 hour shifts. Checkers tell the driver where to go. Spotters (pin knockers) talk to the driver so as to avoid twisting when positioning truck and chassis. Drivers take containers to one of six berths located about 1000 to 6000 feet from the ship with most berths located no more than 1000 feet away. (Tr. 524-527, 538). Drivers don't handle devices used to lift "out of gage" or heavy containers and are discouraged from getting out of their truck when under the whip because of lack hard hat and safety vest. (Tr. 521–522, 531).

Riggers or lashers work on the vessel utilizing rods and turn buckles weighing 30 to 40 pounds to lash down or unlash containers. (Tr. 540, 552-554). Riggers work an 8 hour shift but alleged are only required a total of 1½ hours before being allowed to take a break. (Tr. 517, 518, 545). Pin knockers also work an 8 hour shift and number four per gang. Pin knockers work under the whip and assist the driver in spotting his truck and chassis. (Tr, 525-526). They also twist locks used on containers that are stacked two or three high on ship decks.(Tr. 542).

Drivers like other dock workers cannot walk off the job without securing a replacement. If they do so, Employer removes their name from its payroll and tries not to re-employ them. (Tr. 516). Drivers work anywhere from 4 to 12 hours depending on the ship involved and remove about 5

containers per hour during unloading operations. (Tr. 529).

F. Testimony of Drs. Martin Grabois and Jack Pennington

Dr. Pennington, who saw Claimant on two occasions, (April 6, and November 4, 1998), and reviewed the medical records including Dr. Abdelsayed treatment notes, testified that on Claimant's first visit of April 6 he was doing well with intermittent right buttock pain with prolonged sitting and bending. Claimant's condition was unchanged as of the second visit of November 4 with an MRI of November 10, 1998 showing significant improvement and disk desiccation at L3–4, L4-5, L5-S1 with no neurological deficits. (EX-34, pp. 41-43, 47). Dr. Pennington found Claimant's status consistent with multiple level discogenic disease or residual associated with low back condition and surgery. (EX-34, p.44).

As of June 28, 2002, Dr. Pennington opined that after viewing Claimant on surveillance CDs of February 1, 3, 1999; March 31, April 9, 16, 17, 26, May 1, 2001; January 15, 21, April 25, May 24, and June 11, 2002 and reviewing Claimant's initial statement to Dr. Abdelsayed following the July 7, 1997 incident, and the August 24, 2000 FCE, it was unclear whether Claimant's back condition was the result of a July 7, 1997 injury or a natural process of degenerative processes based on normal activities. Regardless, Claimant could not return to his former gear man work but could work as a dock driver. (EX-34, pp. 49-54). Further, Claimant could do the following jobs identified by VE Ms. Favaloro: shuttle bus driver, assembly line worker.

Dr. Pennington later opined that it is possible but not probable that Claimant injured his back on July 7, 1997, and placed the following restrictions on Claimant: medium level work, sitting-8 hours with breaks of 1 to 5 minutes every 1 to 2 hours, walking-8 hours, lifting 10 to 20 pounds frequently, 10 pounds constantly, 20 to 50 pounds occasionally, bending-4 hours continuously, climbing-no heights, twisting-2 hours. (EX-34, pp. 94-105).

On July 18, 2002, Dr. Grabois, who has treated Claimant since February 14, 2000, and reviewed the medical record including the FCE and surveillance videos, opined that Claimant should not resume full time work, but rather, should attempt at most part-time work starting with 4 hours per days and working up to 8 hours per day and then attempt 8 hour work on an intermittent basis. Concerning work restrictions Claimant could walk 2 to 3 hours with intermittent sitting and standing, lifting 20-50 occasionally, 10 to 20 pounds frequently, and 10 constantly, bending- less than 1 hour; no squatting, standing (same as walking), kneeling-less than 1 hour, twisting-0 to less than 1 hour, climbing-less than 1 hour. (CX-8, pp. 16-21,27). After reviewing a video showing dock driving, Dr. Grabois thought Claimant could do type of work subject to the above limitations because of frequent downtime involved with that job. (CX-8, pp. 22-24, 62, CX-26).

Dr. Grabois further opined that Claimant reached MMI at least as of February 15, 2002 and

probably earlier but gave no date and stated that Claimant would have both good and bad days making consistent employment problematic. Claimant ideally should have a job that lets him take a 15minute to hour break when needed so that he could lie down to relieve pain. (CX-8. pp 26-28, 41). Dr. Grabois admitted that the limitations he imposed were based upon Claimant's pain complaints and if what he (Claimant) reported was incorrect, so too were his (Dr. Grabois) assessment of Claimant's limitations and work capacity. (CX-8, p. 44, 58). However, Claimant's complaints were consistent with the injury he suffered and the medical attention received. (CX-8, p. 69).[12]

G. CD Video Surveillance of Claimant

Employed used Parker Private Investigations to take videos of Claimant. Parker spent up to 500 hours watching Claimant but secured only 5 to 7 hours of video. (CX-27, 28). The first surveillance video shows Claimant over a 20 minute period on February 1, 3, 1999, driving a pickup, pushing a boat, doing repeated bending and getting in and out of truck without a problem. (EX-36). The second video shows Claimant on March 31,2001, driving a pickup hauling and loading pigs in a horse trailer and on April 9, 2001 hauling, tying down and unloading heavy equipment and loading plywood. (EX-37). The length of this video was 1 hour and 24 minutes. The third video shows Claimant over a 24 minute period on April 16, 17, 2001 driving, cleaning and washing a pick up, to Lowe's, and standing for a period of more than 12 minutes. (EX-38). The fourth video shows Claimant on April 26, 2001 helping to load a large tractor tire onto a truck and on May 1, 2001 hauling a windmill and bending in the process. (EX-39). The length of this video was 1 hour and 17 minutes.

The fifth video shows Claimant on April 26, 2001 loading a heavy fan onto a truck. (EX-40). The length of this video was 1 hour and 48 minutes. The sixth video shows Claimant on January 15, 21, 2002, over a 33 minute period driving a pickup, hauling and unloading two tractors. (EX-41). The seventh video shows Claimant on April 25, 2002, over a period of 8 minutes cleaning and fueling his greyhound, mobile home doing repetitive bending with no apparent problem. (EX-42). The eight video shows Claimant on Ma 24, 2002, over a 11 minute period driving to the Golden Corral and also driving up and loading vinal siding at Home Depot and Lowes. (EX-43). The ninth and final video shows Claimant on Jule 11, 2002, over a 5 minute period driving a pickup pulling a trailer, fueling up, and transporting a mattress and bed.
(EX-44).

[12] Dr. Grabois also admitted that no complaints would be consistent with good surgical results. (CX-8, p.70).

H. Testimony of Nancy T. Favoloro and William Joseph Kramberg[13]

Vocational expert, Nancy T. Favoloro reviewed Claimant's medical, financial, and business records and testified that considering Claimant's age, education, medical restrictions and transferable skills, and her observation of the dockside jobsite for 15 hours, Claimant could perform work as a dock driver, pin knocker, and van driver. The medical restrictions which Favaloro used was an August 20 FCE (EX-3), plus restrictions imposed by Drs. Grabois and Pennington. According to Ms. Favoloro those restrictions included the following: lift up to 50 pounds occasionally and 20 pounds frequently; limited (occasional) bending, no squatting or kneeling, walking 2-3 hour, standing 3-4 hours, sitting with periodic breaks, ability to operate foot controls, no hand restrictions, climbing 1-2 hours. (Tr. 565-578, 613-614).

Ms. Favoloro testified that drivers did not have to get out of their cab every time a container was placed on a chassis, but rather no more than 5 times per hour. Drivers use pin knockers or spotters to position their truck negating a need to either climb out, stick their head out of truck or twist to the side. (Tr. 585, 586). Further, dock drivers and pin knockers based on actual work (EX-56) records could work every day of the week under the whip with van drivers working car boats 3 to 4 times per month. (Tr. 586-587).

In addition, Ms. Favoloro identified the following non-longshore, light duty jobs available in the latter part of June, 2002, which Claimant could perform: Avis car rental courtesy bus driver ($10.25 per hour, allowing alternate sitting, standing, and walking with occasional lifting of 50 pounds); shuttle bus driver ($8.65 per hour, allowing alternate sitting, standing, and walking with lifting up to 20 pounds); assembly line worker at Home Fragrance ($7.25 per hour, requiring standing and walking throughout the day except on lunch and other breaks); cashier at Home Depot ($7.00 to $8.00 per hour, requiring standing and walking throughout the day except on lunch and other breaks with no lifting requirement and some bending and reaching) and central station monitor ($8.00 to $9.00 per hour requiring only sedentary work involving watching monitors and calling places of residence and businesses when alarms go off with dispatch of appropriate emergency personnel).

On cross, Ms. Favoloro admitted the courtesy van driver involved medium and not light work. Further, Ms. Favoloro did not use the restrictions set forth by Dr.Gravois in OWCP 5 (CX-10) which established the following limitations: sitting , walking, standing 1 hour each, lifting 10 pounds. Ms. Favoloro admitted that none of the jobs identified were within the restrictions of OWCP 5 or took into consideration Claimant's need to lie down. (Tr. 605-612).

Vocational expert, William Joseph Kramberg, after reviewing Claimant's medical and vocational records and viewing dock side operations for 4 to 6 hours testified that considering

[13] Vocational Expert, Eva M. Haier who evaluated Claimant and prepared 3 vocational reports consisting of 17 pages opined that considering the limitations imposed by Dr. Grabois and Claimant's advanced age it was doubtful if Claimant could be employed. (EX-2).

Claimant's medical limitations as noted previously by Ms. Favoloro plus Claimant's need to lie down to relieve pain, and ability to drive truck except in rush hours with opportunity for significant rest breaks and the need to avoid excessive vibration, Claimant could not perform his past work of gear man, driver, pin knocker, or any non-longshore job identified by Ms. Favoloro. Driving was inappropriate because of Claimant's inability to twist and bend plus the need to avoid excessive vibration cause by driving dock trucks. (Tr. 668-677, 680, 689).

Kramberg testified that pin knocker was inappropriate because it required Claimant to be on his feet all day long. (Tr. 693). Car and van drivers were inappropriate because of the bending, squatting and stooping required to get in and out of vehicles. (Tr. 694). Further, the following jobs were inappropriate for these reasons: courtesy driver required a high school education or equivalency and was 3l.4 miles from Claimant's home representing a cost of $106 per week in travel expenses based on a cost of $ 33.5 per mile; shuttle bus driver involved driving 11 hours per day and was 33 miles from Claimant's home representing a travel cost of 1/3 of Claimant's income from this job; assembly line worker required standing all day for 10 to 12 hours per day, located 43 miles from Claimant's home for a weekly commuting expense of $148; cashier at Home Depot required standing most of the day, excessive bending and lifting 50 pounds, plus was 37 miles from Claimant's residence representing a commuting cost of $128 per week. (Tr.681-685).[14]

Kramberg conceded that Claimant could probably perform the job of video surveillance
monitor. (Tr. 714). Kramberg also admitted that Dr. Grabois based his limitations on what Claimant had said and not what Claimant had done,.but pointed out, that Claimant's work off the dock was controlled by Claimant and performed at his own pace as opposed to the pace set on the docks or elsewhere. (Tr. 696).

IV. DISCUSSION

A. Contention of the Parties

The parties disagree on many issues chief of which is Claimant's credibility with Employer contending that Claimant is a ball face liar concocting the entire July 7, 1997 injury so as to collect disability while knowing he had been suffering from a painful back condition over a prolonged period

[14] Employer attacked the accuracy of Kramberg's testimony by introduction of Kramberg's August 27, 2002 report to Claimant's Counsel (EX-57), May 30, 2002 interview notes of Claimant (EX-58) and his testimony in another longshore proceeding, *Clinton Sneed v. James J. Flanagan Stevedore, Inc and Signal Mutual Indemnity Assoc. Ltd.* Case No. 97-LHC-2026 (EX-59) wherein he estimated that Claimant had a $10,000 annual loss of income because of a work related injury whereas EX-54 showed an increase in weekly earnings from $1,168.00 to $1,700.00.

of time. Employer asserts that Claimant in an effort to continue receiving income after losing a long held permanent job with employer launched a three pronged attack including obtaining retirement benefits not based upon disability, attempting but unsuccessfully to receive Social Security Disability, and finally filing the instant compensation claim.

In order to be successful with the instant claim, Employer argues that Claimant lied about prior back problems, prior medical treatment, the date of the injury, persons who saw the injury, the date he reported the injury, information Claimant reported to physicians and vocational counselors and his functional capabilities following surgery. Further Employer argues that regardless of whether Claimant was injured as he claimed, he is nonetheless capable of performing container driving duties as evidence by: **(1)** both treating physician and independent medical examiner opinion; **(2)**Claimant's post-injury activities in buying, selling, and hauling containers; **(3)** video surveillance showing Claimant hauling containers, driving trucks, bulldozers, back hoes, boat drag lines and other types of equipment; **(4)** video surveillance showing Claimant twisting, bending, stooping, lifting and climbing; and **(5)** Claimant's post-injury recreational activity of hunting, fishing, skiing and tubing. As Employer states on page 2 of its brief: "In other words, Claimant contends he is not able to do the very thing the evidence shows him doing: driving equipment. "Further, Claimant has no economic disability inasmuch as he can physically perform the position of container truck driver which position has been available since 1998. Additionally, Claimant can perform a number of off the waterfront jobs identified by Ms. Favaloro including that of courtesy bus driver and shuttle bus driver paying $10.20 and $8.65 per hour, respectively.

Claimant contends that he testified truthfully about a July 7, 1997, accident and the work circumstances surrounding that accident. Contrary to Employer's assertion and the daily wage records it introduced. (EX-23). Claimant contends that additional weekly wage records (CX-29), which Employer never introduced, show him being paid an additional 87 hours of work following the June 19, 1997 cessation of operations during which time Claimant came in on a part-time as needed basis to collect and dispose of remaining gear.

Claimant asserts that he never indicated an inability to engage in activities of daily living, but rather, freely admitted engaging in activities post-injury. Further, Claimant admitted a history of pre-back complaints, back complaints with limited treatment in 1993, 1995 and February 1997. However, none of these complaints had anything to do with severe radiating pain into the legs which was present following the July 7, 1997 injury. None of the pre-injury medicals showed any significant back pathology which was present following the injury and required two back surgeries.[15]. Claimant reported the injury to Helm and on July 7, 1997 told a fellow longshoreman, Jerry Kelley, that he had pulled something in his back at work, and thus, would not be able to go to lunch with him that day.

[15] Post-injury MRIs confirmed the presence of a huge herniation at L4-5.

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Concerning nature and extent of injury, Claimant contends that he reached maximum medical improvement (MMI) on September 15, 2000, [17]with all medicals both before and after this date showing he was unable to perform his past longshore work and thus is total disabled. Thus, up through September 15, 2000, he was temporarily and totally disabled and after that date through July 2, 2002 permanently and totally disabled since Employer failed to establish suitable alternative employment (SAE) during this period. Thereafter, Claimant contends that except for the central station monitor position, Ms. Favaloro failed to show SAE by not relying upon a September 15, 2000, OWCP-5 of Dr. Gravois, but rather, an earlier FCE of August 24, 2000 which found Claimant capable of doing light to medium work as opposed to the more conservative restriction of the OWCP-5 imposing the following restrictions: sitting-1 hour (intermittent), walking-1 hour (intermittent), standing-1 hour (intermittent), 0 to 1 hours lifting, bending, squatting, climbing, kneeling, twisting, lifting 0-10 pounds; unable to work 8 hours a day; retraining is necessary for light work. All of the jobs mentioned in Ms. Favaloro's July 2, 2002 labor survey with the possible exception of the central station monitor exceeded the OWCP-5 restrictions.

Claimant argues that he is entitled to the following: (1) temporary total disability benefits of $801.06 per week, (maximum compensation rate as of July 7, 1997 based upon an average week wage (AWW) of $1,551.19) from August 20, 1997 when he stopped working through September 15, 2000, (2) permanent total disability benefits at the same rate but adjusted for inflation from September 16, 2000 to July 1, 2002, and (3) permanent partial disability benefits from July 2, 2002 to present and continuing at the rate of $801.06 based on a AWW of $1,551.19 with a post injury wage earning capacity of $269.96, representing what the central station monitor payed in July, 1997.

B. Claimant's Credibility , Section 20 (a) Presumption and Causation

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981); *Todd Shipyards Corporation v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962). A claimant's discredited and contradicted testimony is insufficient to support an award. *Director, OWCP v. Bethlehem Steel Corp.*, 620 F.2d 60, 64-65 (5th Cir. 1980);

[16] Kelly testified that earlier that day(July 7, 1997) he observed Claimant coiling up cable on a pallet.

[17] Dr. Grabois testified that at least by February 15, 2000 Claimant had reached MMI.

Mackey v. Marine Terminals Corp., 21 BRBS 129, 131 (1988); *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981).

An employee is aided by the Section 20 presumption that the claim comes within the provisions of the Act unless there is substantial evidence to the contrary. 33 U.S.C. § 920 (2000). All factual doubts must be resolved in favor of the claimant. *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998) (quoting *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991). Under the Administrative Procedures Act, however, a claimant has the ultimate burden of persuasion by a preponderance of the evidence. *Director, OWCP v. Greenwich Colleries*, 512 U.S. 267, 281 (1994). The Section 20(a) presumptions were left untouched by *Greenwich Colleries*. *Id* at 280. Thus, the Section 20(a) presumption applies in determining whether working conditions caused a claimant's injuries. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 118 (1995).

Before invoking the Section 20(a) presumption, a claimant must first establish a *prima facie* case by showing that he suffered some harm and that working conditions existed which could have caused the harm. *O'Kelly v. Dep't of the Army*, 34 BRBS 39, 40 (2000). Once this is done he burden shifts to the Employer to show by substantial evidence, facts - not mere speculation - that the harm was not work-related." *Conoco, Inc., v. Director*, 194 F.23d 684 at 687-88 (5th Cir. 1999) (citing, *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995)); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Smith v. Sealand Terminal*, 14 BRBS 844 (1982).

In the present case, Claimant presented a *prima facie case by* clear and convincing evidence that he suffered a harm (back impairment) and that working conditions existed (coiling heavy wire) which could have caused the harm. Employer responded by attacking Claimant's veracity concerning the July 7, 1997 injury claiming that the July 7, 1997 incident was a total fabrication.

In support of this assertion, Employer noted the following: **(1)** the lack of payroll data showing employment on July 7, 1997; Claimant's statement to Dr. Abdelsayed on August 5, 1997 that he did not know how he hurt his back; **(2)** Claimant's failure to tell Dr. Abdelsayed on August 25, 1997 of the July 7, 1997 injury; **(3)** a September 2, 1997 note from Dr. Abdelsayed stating that Claimant had been under her care for lower back pain for several years; **(4)** Claimant's treatment for back pain by Dr. Abdelsayed on February 19, 1997; **(5)** Claimant's response to interrogatories that he did not receive any treatment from Dr. Abdelsayed for his low back injury; **(6)** Claimant's long stating history of low back problems; **(7)** the alleged failure by Employer to pay for any longshore services rendered after June 19,1997; **(8)** a late report of injury to Helm on August 20, 1997 which was confirmed by a subsequent statement to Paul Haney on September 2, 1997 indicating a report of injury just a couple of weeks prior to said statement; **(9)** the lack of witnesses to the injury; **(10)** Claimant's work as a truck driver after the injury; **(11)** Claimant's failure to discover a lack of payroll information showing employment on July 7, 1997, until the day before the hearing; and **(12)** Kelly, who saw Claimant coiled the cable, testified that Claimant made no immediate complaints when

injured and only later that day declined to go to lunch claiming, but not indicating, how he had hurt his back.

In addition, Employer asserted that post-injury, Claimant exaggerated pain complaints and physical limitations, failed to disclose to doctors or vocational experts significant work and recreational activities, tried to hide or minimize a prior bad back condition, failed to make any diligent work search but rather applied for disability and retirement benefits and has used minimal pain medication.

In response, Claimant points to the following: **(1)**his reputation as a truthful person and one who was not inclined to abuse the system electing on prior occasions not to file for compensation or medical benefits despite job injuries; **(2)** the WGMA payroll showing not only 2 week severance pay but an additional 87 hours of pay for clean up work during which time he was injured; **(3)** Helm's testimony showing a report of the injury prior to August 20, 1997 with a belief that Claimant had in fact been injured as reported; **(4)** the performance of minimal work or recreational activities post-injury; **(5)**Kelly's testimony about what Claimant told him on July 7,1997; **(6)** Claimant's treatment records showing pain complaints consistent with his back impairment and surgery; **and (7)** the lack of significant physical activity on a sustained and consistent basis since the injury as revealed not only in Claimant's testimony but also in Employer's surveillance videos.

After reviewing the entire record and observing Claimant's demeanor on the stand, I credit his testimony concerning a July 7, 1997 back injury. In doing so, I have taken into consideration Employer's assertions, as noted above, but credit Claimant and Helm's testimony as supported by the weekly and not daily payroll records that Claimant did in fact worked and was paid for services past the June 19, 1997 shutdown, during which time he gathered remaining stevedoring equipment for sale to other companies and that on the last day of such work (July 7, 1997), while rolling up heavy wire cable injured his back.

Claimant's long work history, reputation for honesty, and a desire not to seek either medical benefits or compensation, convinced me together with his demeanor and the testimony of Helm that Claimant did suffer a back injury on July 7, 1997 in the course and scope of his employment with Employer. Indeed, Claimant reported a back injury to fellow longshoreman, Kelly, on the day it happened and later to Helm who was out of town on pension business. While Helm testified that Claimant reported the incident on July 7, 1997, I find it more probable as Claimant testified that he waited to report the incident until Helm returned about a week or two later. While Claimant may have had previous back problems, none of those problems prevented Claimant from working for substantial periods of time. Moreover, none of those back complaints produced the degree of pain associated with the July 7, 1997 incident which resulted in two unsuccessful back surgeries. Claimant did not request a "ticket" until August 20, 1997 acting upon the belief that his condition would improve. However, instead of improving his back condition became worse preventing him from

work. Claimant's brief statement on August 5, 1997 to Dr. Abdelsayed that he did not remember how he hurt his back is ambiguous and could easily have been a misunderstanding between Claimant and physician as Claimant testified.

Inasmuch as I have credited Claimant's assertions of the July 7, 1997 injury, I find that Employer has failed to rebut the Section 20(a) presumption and that Claimant sustained back injuries associated with his clean up duties.

C. Nature and Extent of Injury and Date of Maximum Medical Improvement.

Claimant seeks temporary total disability benefits from August 20, 1997 to September 15, 2000, permanent total disability benefits from September 16, 2000 to July 2, 2002 and permanent partial disability thereafter. Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

Here Claimant's treating physician, Dr. Grabois stated that Claimant had reached MMI at least as of February 14, 2000. The medical records show Claimant undergoing a second back surgery on August 16, 1999, followed by continued treatment by Dr. Heggeness who initiated physical therapy on October 12, 1999. (CX-11, p. 19). As of January 18, 2000, Claimant's leg complaints had resolved, but he continued to experience back pain. At that point, Dr. Heggeness referred Claimant to Dr. Grabois for pain management. (CX-11, p. 21). Claimant's condition has remained stable since

at least February 14, 2000 with continued complaints of back pain on exertion. Thus, I find Claimant at MMI as of February 14, 2000.

C. Prima Facie Case of Total Disability and Suitable Alternative Employment

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

Here, Employer concedes that Claimant can no longer perform his former longshore job of gear man, but contends that he is and has been able to work as a dock driver and pin knocker as of June 28, 2002, when Dr. Pennington found Claimant able to do this work. On the other hand, Claimant contends he cannot perform any of his past longshore work on a sustained and consistent basis based upon Dr. Grabois' credible testimony setting forth severe work restrictions as detailed above, and thus, he has established a *prima facie* case of total disability.

Central to the issue of Claimant's work capacity, is his credibility especially his assertions about continuing back and leg pain that cause him to restrict his activity and on occasion to remain in bed for most of the day. In order to discredit Claimant, Employer spent considerable money and effort if surviellling Claimant's activities employing the services of Parker Private Investigations who spent up to 500 hours watching Claimant but produced only 9 videos showing Claimant over a 6 hour and 10 minute period on February 1, 3, 1999; March 31, April 9,16, 17, 26, May 1, 2001; January 15, 21, April 25, May 24, and June 11, 2002 performing various activities including driving a pick up, hauling and unloading livestock, loading and unloading heavy equipment, plywood, fan, vinyl siding, helping to lift a tractor tire with other men, hauling a windmill, cleaning, washing and fueling vehicles, transporting a mattress and bed, and pushing a boat during which Claimant on occasion bent and stooped, push, pulled and lifted without apparent difficulty. While Claimant testified that he tries to avoid these activities so as to protect his back, he admitted can do them on a occasional basis but is nonetheless required to spend 5 out of 7 days per week lying down at his house for periods up to 3 to 4 hours for pain relief. Employer also adduced testimony from Claimant showing a continued purchase, sale and transport of containers following the July 7, 1997 injury plus hunting and fishing activities and attempts at tubing and skiing.

Having reviewed the tapes, I am convinced that Claimant's testimony is credible and that in fact he spends significant portions of his time indoors at his Crawford, Texas home reclining so as to avoid back and leg pain. While the videos do not show Claimant "guarding" his back, none of the activities shown appears to be done at a fast pace as required of dock work. Moreover, none of the activities on the video with the exception of tire lifting, appears to exceed the restrictions imposed by Dr. Grabois. Claimant's limited attempts at skiing and tubing do not establish a greater work capacity than established by Dr. Grabois nor does Claimant's continued container business which is performed at his own pace.

After reviewing the entire records, I am convinced that Claimant cannot perform any of his former longshore work on a sustained and consistent basis based upon the testimony of Dr. Grabois who limited Claimant at most to part time work dock driving work starting with 4 hours per day and eventually working up to 6 and then 8 hours per day. Based upon the testimony of Tommy Isbell and Randy Stiefel, it is clear that although some of dock driver position may require only 4 hours of work, work shifts can and do last up to 12 hours with employees not permitted to leave early without securing a replacement. Employees who leave early without replacements find re-employment difficult to obtain.

Further, I find based upon credible testimony from Claimant and Isbell, that dock drivers experience considerable bending, twisting, stooping, and vibrations which Claimant cannot endure and as such this work is inappropriate given Claimant's back condition. While Ms. Favaloro and Dr. Pennington would find dock driving appropriate, I find both Claimant and Isbell more knowledgeable about the job demands inasmuch as both have actually performed the work in question.

Regarding other dock work, Ms. Favoloro testified that Claimant could work as a pin knocker. However, her testimony did not take into consideration the standing or part time restrictions imposed by Dr. Grabois. According to Kramberg, this job involved standing all day long which exceeded Claimant's limitations, and thus, was inappropriate. Indeed, according to Kramberg, Isbell, and Helm, all of whom I credit, there is no light duty dock work. Rather, dock work is physically demanding requiring longshoremen to work at a fast pace. Thus, I find, that Claimant cannot perform his past longshore work (gear man or dock driver) and accordingly has established a *prima facie* case of total disability.

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996); *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective

testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991)(crediting employee's statement that he would have constant pain in performing another job). An Employer may establish suitable alternative employment retroactively to the day Claimant reached maximum medical improvement. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc.., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

Here, Employer has shown, and Claimant's vocational expert, Kramberg, has conceded the suitability of the central station monitor position paying at least $8.00 per hour. Such work was sedentary

in nature involving watching monitors and calling businesses and residences when alarms went off together with dispatch of appropriate emergency personnel.

Regarding the pin knocker position, I agree with Kramberg that it was inappropriate because of excessive standing. The car and van driver jobs were equally in appropriate because of excessive bending, squatting and stooping required when getting in and out of vehicles. The assembly line worker position at Home Fragrance was inappropriate because of excessive standing 10 to 12 hours per day. Also inappropriate was the shuttle bus driver position because it necessitated up to 11 hours of driving per day. The courtesy van driver was also inappropriate because it involved medium duty work lifting up to 50 pounds which exceeded Dr. Grabois restrictions.

Thus, I find that as of Ms. Favaloro July 2, 2002, labor market survey, Claimant was capable of performing the video surveillance monitor position which at that time paid at least $8.00 per hour. Hence as of July 2, 2002, Claimant's condition went from permanent total to permanent partial disability.

D. Medical Benefits, Section 914(e) Penalties, and Section 8(f) Relief

In general an employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Setion 7(b), is well settled. *Bulone v. Universal Terminal and Stevedore Corp.*, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. *Tough v. General Dynamics Corporation*, 22 BRBS 356 (1989); *Gilliam v. The Western Union Telegraph Co.*, 8 BRBS 278 (1978).

In this case, Employer attempted to negate medical benefits by asserting Claimant was not injured during the course and scope of his employment with Employer. Inasmuch as I have found to the contrary, I find Claimant is entitled to continued medical treatment from Dr. Grabois for his work related injury.

Concerning the issue of penalties, Section 914(a) of Title 33 of the U.S. Code, provides that compensation "shall be paid . . . promptly . . . without an award, except where liability to pay compensation is controverted by the employer." Section 14(c) requires the employer to give notice to the deputy commissioner "upon suspension of payment for any cause." Section 14(d) requires the employer, if it "controverts the right to compensation," to file with the deputy commissioner, within fourteen days after knowledge of the alleged injury, a notice of controversion. Section 14(e) calls for a ten percent penalty when pre-award benefits are not timely paid, unless the employer filed a timely notice of controversion. Here, Employer filed a timely controversion on October 1, 2001 followed by two additional controversions on December 21, 2001 and January 24, 2002, and as such is not liable for penalties under Section 914 (e).

Regarding the issue of Section 8(f) relief, that shifts a portion of the liability for permanent partial and permanent total disability from the employer to the Special Fund established by Section

44 of the Act, when the disability is not due solely to the injury which is the subject of the claim. Section 8(f) is, therefore, invoked in situations where the work-related injury combines with a pre-existing partial disability to result in a greater permanent disability than would have been caused by the injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991). Relief is not available for temporary disability, no matter how severe. *Jenkins v. Kaiser Aluminum & Chemical Sales*, 17 BRBS 183, 187 (1985). Most frequently, where Section 8(f) is applicable, it works to effectively limit the employer's liability to 104 weeks of compensation. Thereafter, the Special Fund makes the compensation payments.

To show entitlement to Section 8(f) relief an employer must present evidence on three different requirements: (1) that the claimant had a pre-existing permanent disability; (2) that this partial disability was manifest to the employer; and (3) that it rendered the second injury more serious than it otherwise would have been. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309 (D.C. Cir. 1990). In cases of permanent partial disability the employer must also show that the claimant sustained a new injury, *Jacksonville Shipyards v. Director, OWCP*, 851 F.2d 1314, 1316-17 (11th Cir. 1988), and the current disability must be materially and substantially greater than that which would have resulted from the new injury alone. *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884 (5th Cir. 1997); *Director, OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d 303, 307 (5th Cir. 1997).

In the present case, while there is evidence that Claimant had back problems prior to the July 7, 1997 injury, there is no evidence to show a pre-existing permanent disability. Indeed, Claimant worked despite this condition missing minimal work. Morever, there is no evidence to show that Claimant's prior back condition rendered the second injury of July 7, 1997, more serious than it otherwise would have been. Thus, I find no merit to Employer's request for Section 8(f) relief.

E. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (2002)." This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

F. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from August 20, 1997 to February 14, 2000, based on an average weekly wage of $1,551.19 and a corresponding compensation rate of $801.06.

2. Employer shall pay to Claimant permanent total disability compensation pursuant to Section 908(a) of the Act for the period from February 15, 2000 to July 2, 2002, based on an average weekly wage of $1,551.19, and a corresponding compensation rate of $801.06 (maximum compensation rate) adjusted for inflation.

3. Employer shall pay to Claimant permanent partial disability compensation pursuant to Section 908(c) of the Act for the period from July 3, 2002, and continuing based on an average weekly wage of $1,551.19, and a post-injury wage earning capacity of $269.96 per week ($320.00 minus interim inflation increase) for a corresponding compensation rate of $801.06.

4. Employer shall be entitled to a credit for all compensations paid to Claimant ($170,296.91) from August 20, 1997 through September 16, 2001.

5.. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated in accordance with 28 U.S.C. §1961.

6. Employer shall pay Claimant for all future reasonable and necessary medical care arising

out of his work related injury of July 7, 1997 pursuant to Section 7 (a) of the Act.

7. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge